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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957 No. 258

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al.,

Appellants,

v.

FROZEN FOOD EXPRESS, et al.,

Appellees

## BRIEF OF THE APPELLANT RAILROADS IN REPLY TO THE MOTION TO AFFIRM ON BEHALF OF APPELLEE, FROZEN FOOD EXPRESS

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### I.

### STATEMENT.

By a motion duly served[1] on counsel for the Railroads—which include all of those railroads set forth in Appendix A

[1] It is difficult to fix the date on which the Appellee's Motion to Affirm was served because for reasons unknown to these Appellant Railroads, counsel for the Appellee made available the Motion to Affirm both to this Court and to counsel for the Appellants before receiving the several appellants' Statements of Jurisdiction. It is believed that this Court could not accept the motion to affirm for filing until the several appeals were docketed. If this is so, the service date for the motion to affirm could not be before July 10, 1957 and if Rule 16 is to govern, it would appear that the last service date of the Motion to Affirm would be no earlier than August 10 or thereabouts. Since this reply brief was filed with this Court on or before July 31, 1957, it is believed that this brief was timely filed.

of the Appellant Railroads' Statement of Jurisdiction filed with this Court on July 19, 1957 and assigned case No. 258 October Term, 1957, the Appellee, Frozen Food Express, has asked this Court to affirm an order of the Court below without receiving briefs or hearing oral arguments on the merits. The order of the Court below which the Appellee has asked this Court to affirm is set forth in Appendix B of the Appellant Railroads' Statement of Jurisdiction and from the standpoint of the instant appeal, enjoins the Interstate Commerce Commission from enforcing its order issued in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), insofar as the Commission in that order found and concluded that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen) are not agricultural commodities within the meaning of Section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. 303 (b)(6). The opinion of the Court below setting forth the basis for its order which is the subject of this appeal is reported in *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas 1956).

The particular Section of the order of the Court below which is the subject of the instant appeal is also the subject of two other appeals to this Court, one brought by the Interstate Commerce Commission[2] and the other brought by the American Trucking Associations Inc.[3] The issues in each of these appeals are identical. Although it appears from its caption that the Appellee's Motion to Affirm is only filed in the appeal of the Interstate Commerce Commission, any action upon it by this Court will govern all three appeals so that therefore it must be assumed that the Motion to Affirm for all practical purposes has been filed in the instant appeal. Accordingly, it is deemed appropriate under the provisions of Rule 16, par. 3 for these Appellant railroads to file this brief in reply to the Appellee's Motion to Affirm

[2] *Interest Commerce Commission* v. *Frozen Food Express*, No. 270, October Term, 1957 (U. S. Sup. Ct.)

[3] *American Trucking Associations Inc.* v. *Frozen Food Express*, No. 263, October Term, 1957 (U. S. Sup. Ct.).

regardless of whether from a purely technical standpoint, the motion to affirm has been properly filed in the instant appeal.

The immediate question before this Court by reason of the Appellee's Motion to Affirm is whether the order of the Court below to the extent that it is the subject of appeal, should be affirmed without this Court considering briefs and oral arguments addressed to the merits. Without in any way denying the desirability of terminating litigation by the simplest means, particularly where the simple approach is frugal of this Court's most precious time, and of its greatly extended energies, this is peculiarly an instance where a full consideration of this Court, in the long run will reduce litigation and do much to bring certainty in a field where its lack has not only been a source of widespread disturbances to the nation's transportation industry, but also of serious harm to a considerable segment of the nation's economy which is dependent upon for-hire transportation to move the products of its labor in interstate commerce.

These Appellant Railroads are asking this Court to note probable jurisdiction of this appeal and to receive both written and oral arguments, in the firm belief that such a complete consideration will provide the only feasible basis for terminating a course of litigation that has been troubling the federal courts and the Interstate Commerce Commission for many years, and which has created great confusion, uncertainty and distress throughout the nation's transportation industry.

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## II.

## ARGUMENT.

### A. There is Nothing in the Motion to Affirm To Refute the Contentions of These Appellants That the Question Here Involved Is A Substantial One.

It is clear beyond all doubt that the Motion to Affirm filed on behalf of the Appellee, Frozen Food Express, is in no way addressed to the contentions made by these Appel-

lant Railroads in their Statement of Jurisdiction,[4] and that it contains no argument which answers those presented by these Appellants as to why the question here is a substantial one.

Reduced to essentials, Appellee's Motion to Affirm contains but one reason why the order of the Court below should be affirmed without briefs and arguments on the merits. That reason set forth on Pages 3 and 4 of the Motion is to the effect that the Court below has correctly applied the "continuing substantial identity test" pronounced by this Court in *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956), in holding that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen) are "agricultural commodities" as that term is used in Section 203 (b)(6) of the Interstate Commerce Act. Nothing beyond a naked assertion is offered to show why the Court below was correct in its application of the test and similarly, there is no explanation as to why the Interstate Commerce Commission was wrong in reaching conclusions diametrically different from those of the Court below.

Without again presenting the arguments set forth in the Statement of Jurisdiction of these Appellants, but at the same time specifically inviting attention to them, it is by no means clear that the Court below either adequately understood the continuing substantial identity test, or properly applied it to the particular commodities here involved. As these Appellants in their Statement of Jurisdiction have previously indicated in some detail, it appears that the Court below has misunderstood this Court's opinion in the *East Texas Lines* case, as have other federal district courts, and that these misunderstandings have produced results, which, at the very least, are creative of extensive confusion and uncertainty. This confusion and uncertainty, typified by the Court's conclusion that fresh eggs and fresh milk

[4] Indeed it would be surprising if such were the case in view of the fact that the Motion to Affirm was prepared, printed, and made available to this Court before the Statement of Jurisdiction was either filed with this Court or served upon counsel for the Appellee.

retain a continuing substantial identity even when by extensive processing they are converted to powdered eggs and powdered milk, which nowhere are sold or regarded as the equivalent of the fresh products, is not a matter of mere academic or intellectual concern, but of nation-wide practical importance. This is true because so long as uncertainty and confusion exist as to how the exemption in Section 203 (b)(6) should be interpreted and applied the nation's regulated transportation industry can neither sensibly program capital expenditures for the type of equipment required to move manufactured agricultural commodities, nor economically devote its energies and efforts to improve the methods of handling such traffic. Harmful as this is to the transportation industry, the matter does not end there, for the orbit of harm extends further and visits severe consequences upon those throughout the nation who depend on the regulated transportation industry to market the products of their labor. In every sense therefore, this is a case of national importance which should only be decided after the fullest consideration by this Court.

## III.

## THE RELIEF REQUESTED.

For the reasons set forth above and for the reasons detailed more fully in the Statement of Jurisdiction of these Appellant Railroads it is most respectfully submitted that the Motion to Affirm should be denied and that this Court should note probable jurisdiction and thereupon assign this case for oral argument to be implemented by the submission of printed briefs on the merits.

Respectfully submitted,

CARL HEEMETAG, JR.,
JAMES W. NISBET,
CHARLES P. REYNOLDS,
Counsel for Appellant Railroads.

## CERTIFICATE OF SERVICE.

I, Carl Helmetag, Jr., attorney for the Appellant Railroads herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Statement of Jurisdiction on the several parties to this action as follows:

1. On the Appellee, Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq., and Leroy Hallman, Esq., First National Bank Building, Dallas, Texas;

2. On the Secretary of Agricultural, by mailing copies in a duly addressed envelope, with postage prepaid, to his attorney of record, Charles W. Bucy, Esq., Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.;

3. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, the Honorable Herbert Brownell, Attorney General; and James E. Kilday, Esq., and Charles S. Sullivan, Jr., Esq., United States Department of Justice, Washington 25, D. C.; by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Malcolm R. Wilkey, Esq., United States Attorney, Houston, Texas: and by mailing a copy in a duly addressed envelope, with postage prepaid, to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

4. On the Interstate Commerce Commission by mailing copies in a duly addressed envelope, with postage prepaid to the Honorable Robert W. Ginnane, General Counsel, Washington, D. C.

5. On the several other parties by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to wit: David G. Macdonald, Esq., and Francis W. McInerny, Esq., Commonwealth Building, 1625 K St., N.W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N.W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C.; and by mailing copies in duly addressed envelopes with air mail postage prepaid to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

Dated, this the 31st day of July, 1957.

Carl Helmetag, Jr.